Laborers' Union Local No. 324, Laborers' International Union of North America, AFL–CIO (Associated General Contractors of California, Inc., Lawson Mechanical Contractors) ***and*** **Douglas Murray.** Case 32–CB–3253

August 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

On January 30, 1991, Administrative Law Judge Gerald A. Wachnov issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(b)(1)(A) of the Act by adopting and maintaining a no-solicitation/no-distribution rule designed to preclude the distribution of dissident union material, by threatening to have Douglas Murray arrested and removed from the hiring hall in order to prevent him from distributing dissident union material, and by threatening to have him arrested if he continued to disseminate such material outside the hiring hall. The Respondent excepts, contending, inter alia, that Murray's conduct is not protected by Section 7, that the rule served a legitimate union purpose, and that the Board cannot find a violation in the absence of internal union discipline. For the reasons set forth below, we find no merit in the Respondent's contentions.

Douglas Murray is an active member of the Respondent Union, a vocal critic of the local union leadership, and, recently, an unsuccessful candidate for union office. During this time, Murray edited and published a newsletter containing articles on labor-related matters in general, as well as articles criticizing the practices and procedures of the Respondent. Specifically, the newsletters contained articles critical of the Respondent's elected and appointed officials and representatives, including allegations that the union officers and representatives receive salaries, allowances, and expenses far in excess of their value to the Union; that the Respondent's leaders waste members' money on expensive meals and trips, disregard parliamentary procedure when it suits their purposes, and negotiate sweetheart contracts; and that the Respondent permits employers to disregard their contractual commitments and allows dishonest hiring hall procedures. In each issue, Murray also urges members to attend union meetings in order to remedy the wrongs specified in the newsletters. Since 1988, Murray has distributed copies of the newsletter at the Respondent's hiring hall.[2]

On June 23, 1989, the Respondent called the police and asked that Murray be removed from the hiring hall because he was passing out literature. After the Respondent's business manager and secretary treasurer admitted that there was no union rule prohibiting the distribution of literature, the police left. Subsequently, at a union meeting on June 27, a no-solicitation/no-distribution rule was adopted, which states: ''During operating hours the offices and halls of Local 324 are to be used only for legitimate union business. No person is permitted to use these premises for solicitation for any cause nor for distribution of literature.'' This rule was posted at each of Respondent's hiring halls. Immediately after the meeting, the Respondent's business agent told Murray that ''the next time you hand out literature you're gonna be arrested.'' On August 2, while Murray was distributing literature in the hiring hall parking lot, the Respondent's business agent told Murray that he was going to call the police if Murray did not leave.

In adopting the judge's finding that the Respondent violated Section 8(b)(1)(A) by enacting the new rule and by threatening Murray with its enforcement, we note first that Murray's conduct was protected by Section 7 of the Act. The Board has long held that Section 7 guarantees employees the right to criticize their bargaining representative or to persuade others to take such steps as they deem necessary to align their union with their position, and that a union violates Section 8(b)(1)(A) when it restrains or coerces employees in the exercise of that right. *East Texas Motor Freight*, 262 NLRB 868, 871 (1982) (citing *Nu-Car Carriers*, 88 NLRB 75 (1950), enfd. 189 F.2d 756 (3d Cir. 1951), cert. denied 342 U.S. 919 (1952), and *Roadway Express*, 108 NLRB 874 (1954), enfd. sub nom. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, Local 823, 227 F.2d 439 (10th Cir. 1955)). Thus, by adopting a no-solicitation/no-distribution rule for the sole purpose of prohibiting Murray from disseminating dissident literature in which he protested the decisions of the Re-

[1] In its exceptions, the Respondent argues for the first time that the complaint is barred by 10(b) and by ''General Counsel's laches.'' The Respondent, however, has waived these affirmative defenses by failing to plead or litigate them at the hearing. See *Christopher Street Corp.*, 286 NLRB 253 (1987). Moreover, there is no merit to these contentions. The charge was filed well within the period prescribed by Sec. 10(b), and there is no basis for the application of laches to the General Counsel's prosecution of the charge. *Hawaiian Flour Mill*, 274 NLRB 1108 fn. 2 (1985), enfd. 792 F.2d 1459 (9th Cir. 1986).

[2] The Respondent has maintained three hiring halls, located in Pittsburg, Martinez, and Richmond, California. While he has been a member of the Respondent, Murray has obtained work through all three hiring halls. Although Murray has distributed his newsletter at all three halls, the events at issue occurred only at the Martinez hiring hall.

spondent's officers, criticized their actions, and urged other members to do the same, the Respondent restrained and coerced him in the exercise of what the Board has long recognized as Section 7 rights.

The mere fact that a union acts in response to the exercise of a Section 7 right however, does not necessarily mean that the action is unlawful.[3] Unions are afforded wide latitude in promulgating rules governing their internal affairs. In *Scofield v. NLRB*, 394 U.S. 423 (1969), the Supreme Court articulated the test for evaluating the lawfulness of a union rule and its enforcement. In upholding a union's practice of fining its members who violated a ban on employees' receiving immediate payment for production in excess of a union-imposed ceiling, the Court stated that ''Section 8(b)(1)(A) leaves a union free to enforce a properly adopted rule that reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against members who are free to leave the union and escape the rule.'' 394 U.S. at 430.

Contrary to the contention of our dissenting colleagues, we find that the rule in the instant case fails to satisfy the first two prongs of the *Scofield* test. First, the Respondent has not shown that the rule reflects a legitimate union interest. The record belies our dissenting colleagues' contention that the rule was adopted as necessary for the operation of a fair and reasonably efficient hiring hall. There is no evidence that Murray's distribution of literature unduly disrupted meetings or interfered with referrals from the hall. Rather, the record indicates that the Respondent's sole motivation for adoption of the rule was to silence Murray. In this regard, the Respondent's business agent testified that members ''got tired'' of Murray's distributions and were annoyed with Murray's continued dissemination of material critical of the Union leadership following the election. The Respondent's business agent admitted that the rule was enacted to stop these distributions. Further, the Respondent adopted the rule only after its initial attempt to silence Murray was frustrated when police declined to arrest him in the absence of a rule. Finally, the Respondent's threat to call the police when Murray tried to continue his distribution *outside* the hiring hall clearly reveals that the rule was not designed to improve the operation of the hiring hall.[4]

Second, the Respondent's no-solicitation/no-distribution rule was aimed at stifling the kind of free speech that Congress sought to protect under the Labor-Management Reporting and Disclosure Act (LMRDA).[5] Thus, the rule ''impairs [a] policy Congress has imbedded in the labor laws. . . .''[6] For these reasons, we find that the Respondent's no-solicitation/no-distribution rule and its enforcement fail to meet the *Scofield* test and are unlawful under Section 8(b)(1)(A).[7]

Similarly, we find no merit in the contention of our dissenting colleagues that the Board's inquiry under *Scofield* is limited to evaluating the lawfulness of internal union discipline employed to enforce a rule and that, in the absence of such internal discipline, the Board lacks the authority to determine the propriety of the rule.

Although the Respondent did not subject Murray to any formal internal union disciplinary action or threaten to do so, the Respondent threatened Murray with arrest for disregarding the rule. In fact, the rule was adopted because the police would not effect an arrest in the absence of a rule. We find no logical or legal basis for distinguishing between the threat of internal union discipline for exercising a protected right and the threat of arrest. The result in either case is coercion. Here, the clear message to Murray was that disobedience of the rule would result in the Respondent's causing his arrest. Further, the maintenance of the rule, coupled with the explicit and repeated threats of arrest for disregarding it, forced Murray to choose between risking arrest by continuing to distribute the literature and losing his Section 7 right to distribute dissident material critical of the Respondent. The Act does not require Murray to make such a choice.

Finally, even if the Respondent were not using the rule to threaten Murray with arrest, we agree with the judge that the mere maintenance of a rule that impairs Section 7 rights violates the Act when it was clearly adopted for retaliatory purposes. Such an unlawfully motivated rule will itself deter the employee whose protected actions gave rise to the rule. That employee can reasonably assume that breach of the rule will not go unpunished. Our dissenting colleagues would require the employee to suffer the sanction before ob-

[3] See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

[4] Our dissenting colleagues' opinion is dependent on their characterization and analysis of the no-solicitation/no-distribution rule as separate from and unrelated to the threats of arrest. In fact, the rule was the result of one unlawful threat and the basis for two more. Accordingly, we view the rule not as a discrete act but as part of the continuum of unlawful acts by the Respondent. Further, the dissent's suggestion that Murray had other means available to make his message known to the Respondent's membership ignores that Murray ran the risk of arrest wherever he distributed his literature, both inside and outside the hiring hall.

[5] *Carpenters Local 22 (Graziano Construction)*, 195 NLRB 1 (1972).

[6] *Scofield*, 394 U.S. at 430.

[7] *Graziano*, 195 NLRB at 2. Although the policies of the Labor-Management Reporting and Disclosure Act (LMRDA) are implicated in this case under the *Scofield* test, the violation is found under Sec, 8(b)(1)(A) of the NLRA. Thus, *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989), cited by the Respondent, is not apposite, for it involved the issue of whether there was a violation under the LMRDA. Further, because we find that the basis for the violation is the Act, we also reject the Respondent's contention that the Board should defer to the United States District Court proceeding alleging a violation of the LMRDA for the identical conduct.

taining the Board's remedial protection. We would not require the employee to run that gauntlet.

Our dissenting colleagues contend that motive is irrelevant in assessing the legality of the union's conduct here. We disagree. As noted above, one prong of the *Scofield* test is whether the union's conduct impairs a policy that Congress has imbedded in the labor laws. In determining whether conduct impairs the national labor policy, the Board is free to examine, inter alia, the union's motive for engaging in that conduct. For example, when a union disciplines an employee in retaliation for filing a charge with the Board, such unlawfully motivated conduct offends national labor policy and is unlawful.[8]

Although the dissent argues that the Respondent's rule is facially lawful, the judge did not rule on this issue and neither do we. The essential point is that the Respondent promulgated and maintained the rule solely for the unlawful purpose of stifling Murray's Section 7 right to freely express his opposition to the Respondent. We agree with the judge that the Respondent is free to adopt and maintain a rule which prohibits distribution of material in its hiring hall, so long as the rule conforms to the guidelines set forth in *Scofield*.[9] As discussed above, however, the evidence presented in this case clearly demonstrates that the purpose of the rule was to silence Murray.[10]

Accordingly, we refuse to permit the Respondent to maintain an unlawfully promulgated rule and to threaten employees with its enforcement in violation of the Section 7 rights of those employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Laborers' Union Local No. 324, Laborers' Union of North America, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

MEMBERS BROWNING AND TRUESDALE, dissenting in part.

We dissent from our colleagues' finding that Local 324 violated Section 8(b)(1)(A) by enacting a no-solicitation/no-distribution rule covering the operation of its hiring hall in response to a member's distribution of materials there during business hours. The violation is premised on the Board's authority to prohibit union enforcement of a rule that ''invades or frustrates an overriding policy of the labor laws''[1]—here, the Section 7 right to criticize the bargaining representative and the ''free speech'' provisions of the Labor-Management Reporting and Disclosure Act.[2] We believe the holding that a union has violated Section 8(b)(1)(A) merely by passing a rule that is not facially unlawful[3] and relates to purely internal conduct is an

[8] *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968); *Laborers Northern California Council (Baker Co.)*, 275 NLRB 278, 290 (1985), and cases cited therein.

Contrary to the suggestion of our dissenting colleagues, we do not hold that *every* improperly motivated act gives rise to a violation. We deal only with the facts of this case, where the evidence of motive establishes that the *Scofield* test has not been met.

[9] Contrary to our dissenting colleagues, we find that the Supreme Court's decision in *NLRB v. Boeing Co.*, 412 U.S. 67 (1973), endorses our application of the *Scofield* test in this case. As the Court stated in *Boeing*, it is the Board's determination that ''union discipline does not interfere with the employee-employer relationship or *otherwise violate a policy of the National Labor Relations Act*,'' that forecloses the Board's evaluation of the reasonableness of a fine imposed by a union or a union's motivation for imposing a fine. Id. at 78 (emphasis added). As discussed above, the record indicates that the Respondent's rule clearly violates a policy of the Act, and thus our colleagues' reliance on the court's decision in *Boeing* is misplaced.

Boeing is best understood in light of its forebear, *NLRB v. Allis-Chalmers*, 388 U.S. 175 (1967). *Allis-Chalmers* held that a union did not offend national labor policy by fining a member who crossed the union's lawful picket line. Given the legality of the fine, the Court in *Boeing* simply held that the Board was not free to regulate the amount of the fine. Neither of those cases however, is relevant to the instant case where the conduct does offend national labor policy.

[10] In adopting the judge's finding that the Respondent violated Sec. 8(b)(1)(A), Members Stephens and Cohen find it unnecessary to rely on the judge's discussion of *Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981). Moreover, the facts of the underlying Board case, *Teamsters Local 515 (Roadway Express)*, 248 NLRB 83 (1980), cited by the Respondent, are distinguishable. In that case, the Board dismissed 8(b)(1)(A) allegations against the union for removing a dissident member's literature from the union's bulletin board in the employee break room at the employer's facility. The Board thus concluded that the union did not ''discipline'' or ''threaten'' the employee, and the union's actions were ''completely devoid of any implications of retribution.'' The Respondent's actions here are not so benign. With an admitted retaliatory motive, the Respondent adopted a rule denying Murray access to its offices and hiring halls during business hours for the purposes of solicitation and distribution and threatened to have him arrested if he violated the rule. Further, acting beyond the scope of the rule, the Respondent threatened to call the police if Murray continued to distribute his materials in the parking lot.

[1] *Scofield v. NLRB*, 394 U.S. 423, 429 (1969); *Carpenters Local 22 (Graziano Construction*) 195 NLRB 1, 2 (1972).

[2] Sec. 101(a)(2) of the LMRDA provides:

> Freedom of speech and assembly. —Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

[3] The judge did not find that the rule was facially unlawful. See JD at 12–13. Further, the rule here is distinguishable from rules restricting members' right to resign from a union, such as the rule in *Engineers & Scientists Guild (Lockheed-California*), 268 NLRB 311 (1983), which have been found to be facially coercive. See *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

unprecedented and unjustifiable intrusion into union internal affairs, directly contradicts Board precedent, and is inconsistent with Supreme Court precedent elucidating both the NLRA and the LMRDA. Therefore, we dissent from our colleagues' findings with respect to the passing of the bylaw.[4]

Charging Party Murray is an active union member, critic of Local 324 leadership, and, at the time of the hearing, a recently defeated candidate for union office. He publishes a newsletter and has used Local 324's meetings, parking lots, hallways, and hiring halls to distribute the newsletter and other materials, many of which have no relation to local union affairs. On June 23, 1989, Murray spread his materials out on one of two tables available to employees awaiting job referrals in the hiring hall. When a union business manager, responding to the complaints of employees waiting for referrals, told him to remove the materials and leave the hall, Murray refused, stating that he would share the table with other members who wished to use it. A scuffle and irate words ensued, and Local 324 called the police, who refused to remove Murray in the absence of a rule proscribing his activities. Local 324 passed such a rule, 4 days later. The rule reads:

> During operating hours the offices and halls of Local 324 are to be used only for legitimate Union business. No person is permitted to use these premises for solicitation for any cause nor for distribution of literature.

After the rule was passed, a union business agent told Murray that the next time he distributed his materials he would be arrested. Murray continued to distribute literature outside hiring halls and at union meetings. On one occasion a business agent told him that he would summon the police if Murray continued to distribute literature in the facility's parking lot. Murray refused to leave, nothing more was said, and Murray has continued to distribute his materials.

In finding that Local 324 violated Section 8(b)(1)(A) by passing the rule, the judge reasoned that under *Scofield v. NLRB*,[5] the Board is empowered to consider ''the full panoply of congressional labor policies in determining the legality of a union *fine*.''[6] The judge, following the lead of the General Counsel in the complaint, pointed to the LMRDA's free speech provisions[7] as embodying the relevant congressional labor policy reachable by the Board through Section 8(b)(1)(A). After citing cases finding that unions had violated Section 8(b)(1)(A) by filing internal union charges against, and ultimately fining, employees for promulgating dissident views, the judge cited *Helton v. NLRB*[8] to support extending the rationale for such violations to the facts here. In its exceptions, Local 324 argues that the judge has interpreted *Scofield* too broadly, and that *Scofield* authorizes the Board to evaluate the lawfulness under Section 8(b)(1)(A) of a union's *enforcement* of internal rules, not to engage in an examination of the rules themselves. The majority rejects those arguments, and finds that the bylaw is not a ''properly adopted rule which reflects a legitimate union interest.''[9] We disagree with our colleagues and find merit in Local 324's exceptions. We would dismiss the allegation that the union violated Section 8(b)(1)(A) by enacting the bylaw.[10]

In reaching this conclusion, we assume, without needing to find, that the literature in question may include speech protected under Section 101(a)(2) of the LMRDA. Further, we also assume that, when a union's imposition of internal discipline contravenes LMRDA policies, the Board is empowered to find that the discipline violates Section 8(b)(1)(A).[11] We part company with the judge and our colleagues, however, in that we find no evidence that Local 324 charged, tried, fined, suspended, or expelled Murray, subjected him to any other discipline, or threatened to do so, and we would distinguish this case from the Board cases cited by the judge in this crucial respect. In our view, formal disciplinary action or the threat thereof is the sine qua non of an 8(b)(1)(A) violation under *Scofield*. Thus, we believe that the judge erred in finding that *Scofield* supports a conclusion that Local 324 violated Section 8(b)(1)(A) by passing the bylaw, that our colleagues have erred in holding that the Union violated Section 8(b)(1)(A) by passing a bylaw not shown to be facially unlawful, and that, in so doing, our colleagues are making new law.

As with any allegation that a union or other entity has violated the labor laws, the threshold question is whether the Board has the statutory authority to find the conduct unlawful and to order that it be changed. With respect to unions and their relations with represented employees, the relevant Board authority is set forth in Section 8(b)(1); with respect to the choices a union makes in handling its internal affairs, that authority is, according to Congress and the Supreme Court, extremely limited.

Section 8(b)(1)(A) proscribes conduct that restrains or coerces employees in their exercise of Section 7

[4] We agree that Local 324 violated Sec. 8(b)(1)(A) when its agents threatened Murray with arrest.

[5] 394 U.S. 423 supra, at fn. 1.

[6] JD at 11 (emphasis added).

[7] See fn. 2, supra.

[8] 656 F.2d 883 (D.C. Cir. 1981).

[9] *Scofield* supra, 394 U.S. at 430 fn. 1.

[10] Problems with the judge's reasoning go further than his misreading of *Scofield*. He concedes that Local 324 may prohibit solicitation and distribution during business hours—even through a rule exactly like the rule at issue—as long as the rule is not aimed at Murray. But is Murray, then, to be the only individual permitted to solicit and distribute during business hours at the hiring hall, and is he to be permitted to distribute materials on nonprotected subjects?

[11] *Graziano*, supra 196 NLRB 1, 2, and fn. 1.

rights, subject to the proviso that ''this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.'' Section 8(b)(1)(A) was proposed as an amendment to Section 8(b) by Senator Ball after the Senate bill reached the floor, with the express purpose of ''free[ing employees] from the coercion of goon squads and other strong arm organizing techniques which a few unions use today.'' 2 Leg. Hist. at 1525 (LMRA (1947)). In urging the addition of 8(b)(1)(A), Ball stressed that the provision was intended to reach, e.g., threats of violence, mass picketing, economic reprisals, or false promises. He amplified: ''the commonplace in organization campaigns is for the business agent to threaten all employees and tell them that if they do not join the union . . . or vote for it they will be charged double initiation fees afterward.'' Id. at 1019. He cited individuals who, or whose employees, were ''threatened, jostled, or beaten, whose shops were picketed, who were the targets of verbal abuse'' without any recourse, because the unions' actions fell outside state law. Id. at 1018–1021.

Floor debate on Section 8(b)(1)(A) repeatedly returned to the fact that its limited underlying purpose would not interfere with union self-government or management of internal union affairs. ''The note repeatedly sounded is as to the necessity to protect individual workers from union organizational tactics tinged with violence, duress, or reprisal.'' *NLRB v. Drivers Local Union*, 362 NLRB 274, 286 (1959). Senator Ball explicitly stated that ''*it was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions*.'' *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 187 (1967), citing 2 Leg. Hist. at 1141 (1947), (emphasis in original). It was against this background that Congress considered and adopted Section 8(b)(1)(A). Significantly, Section 8(b)(1)(A) contains explicit language preserving the union right to self-governance through the proviso exempting from the 8(b)(1)(A) prohibitions the right to make rules as to membership.

In *Allis-Chalmers*, supra, the Supreme Court, in upholding a union's right to fine members for crossing picket lines, construed Section 8(b)(1) and its legislative history and concluded categorically that 8(b)(1) does not empower the Board to call unions before it on matters involving strictly internal conduct. The Court further commented on the interplay between union freedom from internal regulation and the rights accorded employees by the Landrum-Griffin Act:

> Even [as Congress considered measures to protect employees as union members], some Senators emphasized that ''in establishing and enforcing statutory standards great care should be taken not to undermine union self-government. . . .'' Congress expressly recognized that a union member may be ''fined, suspended, expelled, or otherwise disciplined,'' and enacted only procedural requirements . . . . Congress added a proviso to the guarantee of freedom of speech and disclaiming any intent ''to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution.''[12]

In *Scofield*, the Court distinguished again between internal union discipline and discipline aimed at affecting an employee's employment status, noting that Landrum-Griffin did not alter the interpretation of Section 8(b)(1)(A) followed in *Allis-Chalmers*. The Court also acknowledged that some union rules could frustrate the Act's plain policies ''and the union would commit an unfair labor practice by *fining or expelling members who violated the rule.*''[13] The Court noted, however, that

> [although the Board's construction of [(Section 8(b)(1)(A))] *emphasizes the sanction imposed rather than the rule itself and does not involve the Board in judging the fairness or wisdom of particular union rules*, it has become clear that if the rule invades or frustrates an overriding policy of the labor laws the rule *may not be enforced*, even by fine or expulsion, without violating 8(b)(1). [Id. at 429, emphasis added.]

Thus, the Court held that under this ''dual approach,'' a union is ''free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.''[14]

Scofield contains no hint that Section 8(b)(1)(A) empowers the Board to examine the *content* of a union rule or the ''motivation'' for it when it is not facially unlawful and no enforcement is alleged; the Court's inquiry into the rule's policy and purpose was premised on the very fact that the rule was enforced against members through fines. In *NLRB v. Boeing Co.*,[15] the Court clarified *Scofield*'s underlying premise, i.e., that the alleged coercion that brought the union's action within the ambit of Section 8(b)(1)(A) was precisely the fine involved.[16] The Court stated in *Boeing*:

> Section 8(b)(1)(A) of the Act provides . . . that it shall be an unfair labor practice for a labor organization ''to restrain or coerce (A) employees in

[12] Id. at 194 (citations omitted).

[13] 394 U.S. 423, at 429 (emphasis added).

[14] 394 U.S. at 430.

[15] 412 U.S. 67 (1973).

[16] ''While 'unreasonable' fines may be more coercive than 'reasonable' fines, all fines are coercive to a greater or lesser degree.'' Id. at 72–73.

> the exercise of the rights guaranteed in section 7 . . . [among] which is the right to refrain from any of the concerted activities described in that section. We have previously held that Section 8(b)(1)(A) was not intended to give the Board power to regulate internal union affairs, including the imposition of disciplinary fines . . . against members who violate the unions' constitution and bylaws.

Id. at 71–72 (citations omitted) (citing, inter alia, *Scofield v. NLRB*, supra).

The *Boeing* Court overruled contrary dicta in earlier cases and held that the Board could not make such inquiries because ''to the extent that the Board was required to examine into such questions as a union's motivation for imposing a fine it would be delving into internal union affairs in a manner in which we have previously held Congress did not intend.''[17] Id. at 74. *Boeing*'s clear message, then, is that ''motivation'' is not a relevant consideration even if the Board does not approve of it, unless Congress has chosen to regulate the conduct involved.

Further, the Court has repeatedly and explicitly relied in *Boeing*, *Scofield*, and subsequent cases on its finding in *Allis-Chalmers*, supra, that

> [w]hat legislative materials there are dealing with Section 8(b)(1)(A) contain not a single word referring to the application of its prohibitions to traditional internal union discipline in general . . . . On the contrary there are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions.[18]

In finding that the rule prohibiting solicitation and distribution in Local 324's business areas during business hours fails to satisfy the first prong of the *Scofield* test, then, the majority misapplies the Court's language and impermissibly expands Board authority under Section 8(b)(1). The subject matter of the allegation in *Scofield*—for which the Court devised the *Scofield* test—was unambiguous: it plainly involved the lawfulness of a union *fine*. The rule itself, and the union's right to enact it or any other rule, was not at issue. Our colleagues' extension of the *Scofield* test to cover the union's enactment of a bylaw not facially unlawful, then, finds no basis in *Scofield* and flies in the face of settled precedent.

Thus, in acknowledging that *Scofield* is the starting point for the analysis in this case, our colleagues have, like the judge, recognized that enacting the bylaw was an internal union action and must be analyzed under Board law relating to internal union conduct not affecting employment. They have, however, failed to observe the limits that Congress has placed on the Board's authority to intervene in such internal actions. Their discussion of the Union's motive for passing the bylaw is irrelevant where the Board lacks the authority to condemn the act resulting from the allegedly bad motive as restraint or coercion. Therefore, regardless of how regrettable the Union's motive may have been, when the Union has not engaged in conduct prohibited by the NLRA, the Board is not empowered to find that Section 8(b)(1)(A) has been violated. Thus, the allegation relating to the bylaw is on a different footing from the allegation relating to the threats. We agree with our colleagues that the threats of arrest were coercive and violated the Act.[19]

The majority's view of 8(b)(1)(A) appears to be that a showing of improper motivation for an internal union rule is sufficient for a finding of a violation. In our view, such a standard leads to precisely the type of oversight of unions' efforts to administer themselves the Supreme Court condemned in *Teamsters Local 357 v. NLRB*[20] and in *NLRB v. News Syndicate Co.*[21] In *Teamsters Local 357*, the Court rejected the Board's view that union hiring halls were inherently coercive and that to operate one lawfully a union must include assurances that its operation of the hall would be nondiscriminatory. In *News Syndicate*, the Court overturned the Board's finding that a collective-bargaining agreement providing that foremen be union members

[17] Our colleagues interpret *Boeing*, supra, as supporting their inquiry into the motivation behind the Union's passing of the bylaw in the absence of discipline. The very language they cite, however, demonstrates that their reliance is misplaced. In *Boeing*, the Court upheld the Board's determination that ''when the *union discipline* does not interfere with the employee-employer relationship or otherwise violate a policy of the National Labor Relations Act,'' Congress had not authorized it to ''evaluate the fairness of *union discipline* meted out to protect a legitimate union interest.'' Id. at 78 (footnote omitted and emphasis added). Thus, the Court in *Boeing*, as in *Scofield*, had as its subject of analysis one specific category of union activity—the imposition of union discipline: in both cases monetary fines and in *Boeing*, the further onus of debarment from union office for 5 years. Nothing in the language cited by the majority supports the proposition that *Boeing* authorizes the Board to go beyond such discipline and delve into unenforced bylaws.

[18] 388 U.S. 175 at 185-186, cited in *NLRB v. Boeing Co.*, supra, 412 U.S. 67, 72–73; *Scofield v. NLRB*, supra, 394 U.S. 423, 428 (''Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.''). See also *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U. S. 192 fn. 11 (1986). (Congress has been guided by general principle that unions should be free to operate own affairs).

[19] The record shows that in threatening Murray with arrest, Local 324's agents were not seeking to enforce the union bylaw, but rather were acting in response to Murray's protected dissident activities. Indeed, at the time of the first threat, the union bylaw was not even in existence. On two other occasions, Murray was threatened with arrest at times when he was not engaging in conduct that violated the bylaw.

[20] 365 U.S. 667 (1961).

[21] 365 U.S. 695 (1961).

and have charge of hiring was unlawful as encouraging membership in the union. The Court found that the provision was not facially unlawful. In both cases, the Court, in effect, called to the Board's attention its mandate from Congress to limit its interference into internal union affairs and to investigate and proscribe unlawful conduct, rather than to attempt to *prescribe* conduct by reading unlawful intent into facially lawful language. In both cases the Court reaffirmed the following principle: ''In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.''[22]

While this case deals with a local union bylaw rather than with a contract provision, the lessons of *Teamsters Local 357* and *News Syndicate* are applicable here. In all three of these cases the Board examined and condemned union self-regulation in a way not contemplated—indeed, expressly disavowed—by the framers of the Taft-Hartley Act and the Supreme Court. Under the majority's reasoning, all sorts of internal conduct could become subject to Board oversight if alleged to retaliate against an employee for his/her exercise of Section 7 rights or to chill the employee's exercise of those rights. Our colleagues' holding in this case so expands the Board's power to police union internal affairs that any internal act, the motivation of which does not pass muster, is a potential violation. In our view, this assumption of authority not granted by Congress is precisely what the Court repudiated in *Teamsters Local 357* and *News Syndicate*.

In further contrast to two of our colleagues in the majority, we find convincing precedent in *Teamsters Local 515 (Roadway Express)*.[23] There the Board, reversing the administrative law judge, dismissed allegations that a union violated Section 8(b)(1)(A) by removing dissident literature from a company-owned bulletin board dedicated to union use, on which employees could post personal notices. The Board rejected the judge's reliance on cases finding employers to have violated Section 8(a)(1) by prohibiting posting and distribution, observing that, while Section 8(a)(1) prohibits interference, restraint, or coercion in the exercise of Section 7 rights, Section 8(b)(1)(A) prohibits only restraint and coercion. Noting that the charging party, union member Helton, had other means of making his message available to employees, the Board found that Helton was not restrained or coerced in the exercise of his rights and dismissed the complaint.

Members Stephens and Cohen find the union's action in *Roadway Express* ''benign'' by comparison to the Union's passing the bylaw here. We do not agree. Local 324 has a legitimate and statutorily protected interest in maintaining order in its hiring hall. As the judge conceded, the LMRDA provides in Section 101(a)(2) that a member's right of free speech is ''subject to the organization's established and reasonable rules pertaining to the conduct of meetings.'' In addition, the proviso to Section 101(a)(2) protects a union's right to ''adopt and enforce reasonable rules . . . [requiring members to] refrain[] from conduct that would interfere with its performance of its legal or contractual obligations''—a category into which the operation of a fair and reasonably efficient hiring hall clearly falls.[24] In *Roadway Express*, by contrast, the union could not have been serving any ''benign'' purpose whatever by removing only flyers critical of the union from the union bulletin board, while leaving all other member notes and communications in place. Moreover, LMRDA Section 101(a)(2) explicitly permits unions to require that members express themselves at appropriate times and in appropriate fora; it clearly does not require a union to permit members to commandeer any and every assembly for their own purposes, even when those purposes are protected. In *Roadway Express*, the union had, as a practical matter, held the bulletin board out as a place where employees could express personal views, so that the removal of the dissident material demonstrated that all views were permissible—as long as no dissent from union policies was expressed. There is no practical justification for permitting access to the bulletin board for any message except ones critical of the union. In addition, Murray, like Helton, had other means of making his message known to Local 324's membership. As the judge noted, the rule here applies only to the hiring hall and offices and not to distribution during meetings or in other parts of the facility. As the rule permits Murray, and any other member, to continue distribution at meetings and other gatherings, Local 324 was plainly not seeking to suppress all criticism, or even all criticism from Murray himself.[25]

We find that just as the majority and the judge have erred in holding that the Union's passage of the bylaw unlawfully violated Murray's Section 7 rights, the additional finding that the LMRDA's guarantee of free speech is the ''overriding policy of the labor laws'' vindicated by the finding of a Section 8(b)(1)(A) for passing the bylaw is also erroneous, because the Supreme Court has held that absent formal discipline of the member, no cause of action exists against a union for violating the rights guaranteed by the free speech guarantees of the LMRDA. In *Breininger v. Sheet*

[22] *News Syndicate*, supra, 365 U.S. 699–700 (citations omitted).

[23] 248 NLRB 83 (1980), petition for review granted sub nom. *Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981).

[24] See fn. 2, supra.

[25] Thus, the majority overstates the case in finding that the rule was passed to ''silence'' Murray. Although Murray's lack of silence was clearly the catalyst for the rule, the rule permitted him to continue to dissent—and to distribute—at other times and in other parts of the facilities.

Metal Workers Local 6,[26] the Court held that under LMRDA Section 101(a)(5),[27] which prohibits union discipline of a member for exercising the rights the majority and judge purport to protect here, ''discipline'' means only actions taken under an ''established disciplinary process'' such as a hearing followed by a fine or other penalty, not ''ad hoc retaliation by individual union officers.'' Accordingly, the Court dismissed allegations that union officials' refusal to refer a dissident employee through a hiring hall violated the LMRDA.[28] Thus, in this case the efforts of the judge and the majority to champion free speech for union members are misplaced under any applicable precedent. In effect, no policy under the LMRDA has been upheld by finding a violation here.

In our view, then, whether Murray's rights are viewed as originating in the LMRDA or Section 7, under either analysis, the Union's passage of the bylaw, taken alone, does not violate the Act. We note that the majority has not—and cannot—cite any precedent to support its conclusion that the passage of a bylaw that is not facially unlawful violates Section 8(b)(1)(A).

In finding that Local 324 violated Section 8(b)(1)(A) by passing the rule, our colleagues assert that they refuse to permit the Respondent to threaten employees and to maintain an unlawful rule in violation of the Section 7 and LMRDA rights of employees. We agree with them that the Respondent's threats were unlawful. With respect to the passing of the bylaw, however, the General Counsel has failed to allege and the majority has failed to find any conduct that constitutes restraint or coercion under Section 8(b)(1)(A). Further, the ''overriding policy of the labor laws'' to which the judge and the majority refer does not warrant intruding into the Union's internal affairs.

We therefore respectfully dissent from the finding that the Union violated Section 8(b)(1)(A) by passing the bylaw at issue here.

[26] 493 U.S. 67 (1989).

[27] Sec. 101(a)(5) prohibits unions from ''fin[ing], suspen[ding], expel[ling], or otherwise disciplin[ing]'' members for exercising rights guaranteed by the LMRDA. Id. at 90.

[28] The union's actions in *Breininger* are, arguably, violations of Sec. 8(b)(1)(A). Breininger is distinguishable from this case in that the Board is clearly empowered to find refusals to refer unlawful—such refusals interfere with an employee's employment status and are not internal matters. The lesson *Breininger* teaches is that here, when the Board can find no violation of an express prohibition of the NLRA, it cannot find a basis for the violation in the LMRDA.

Jeffrey Henze, Esq., for the General Counsel.

Victor Van Bourg, Sandra Benson, and *Paul D. Supton, Esqs. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, the initial hearing in this matter was held before me in Oakland, California, on August 23, 1990. Thereafter, the record was reopened for the receipt of additional documentary and testimonial evidence, which reopened hearing was held on December 7, 1990.

The initial charge was filed on July 7, 1989, by Douglas Murray, an individual. Thereafter, on August 31, 1989, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Laborers' Union Local No. 324, Laborers' International Union of North America, AFL–CIO (the Respondent) of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). Thereafter the complaint was amended on several occasions, and on July 24, 1990, an amendment to the amended complaint was issued by the Regional Director.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the initial hearing and reopened hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent.

On the entire record,[1] and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Associated General Contractors of California, Inc. (AGC), is an organization comprised of employers in the building and construction industry, and exists for the purpose of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Respondent herein. The employer-members of AGC, in the course and conduct of their business operations, annually purchase and receive, in the aggregate, goods and services valued in excess of $50,000 directly from sellers or suppliers located outside the State of California, and are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Lawson Mechanical Contractors is an employer-member of AGC.

The Respondent is a constituent member of the Northern California District Council of Laborers, an association composed of various constituent labor organizations, which exists for the purpose of representing such labor organizations in dealing with employers, including AGC, with regard to labor disputes and collective bargaining.

During all times material, the Respondent and Larson Mechanical Contractors, for whom the Charging Party herein

[1] At the initial hearing, I rejected certain exhibits offered by the General Counsel. Thereafter, upon reconsidering the arguments presented by the General Counsel at the hearing and in his brief, I received these exhibits into evidence by Order Receiving Exhibits into Evidence and Order Permitting Parties to Request Reopening of Record, and/or Opportunity to Submit Briefs, dated October 11, 1990. Thereafter, I granted the Respondent's Request to Reopen Record.

worked between June through August 1989, have been parties to, and bound by, the terms of the Master Agreement between AGC and the Northern California District Council of Laborers.

The Respondent maintains that the foregoing facts are insufficient to establish jurisdiction over the Respondent, as it has not been shown that the Charging Party's work for Lawson Mechanical Contractors was subject to the Master Agreement or any other agreement between AGC and the District Council of Laborers; and that it is possible that the Charging Party's work for Lawson Mechanical Contractors was governed by some contract other than an AGC contract. Thus, according to the Respondent, since the record contains no jurisdictional evidence with regard to Lawson Mechanical Contractors, as a single employer, the General Counsel has failed to prove jurisdiction.

While it appears unnecessary to establish the Board's jurisdiction over Lawson Mechanical Contractors as opposed to jurisdiction over AGC or any of its constituent members as a potential employer of the Charging Party, as in hiring hall situations,[2] I find that the evidence, detailed above, does establish such jurisdiction over Lawson Mechanical Contractors as a constituent member of AGC. The Respondent's mere speculation that Lawson Mechanical Contractors may have hired the Charging Party under some collective-bargaining agreement other than an agreement between AGC and the District Council is unaccompanied by any evidence whatsoever. Indeed, there has been no showing that Lawson Mechanical Contractors is a party to any other agreement.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Respondent is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue raised by the pleadings is whether the Respondent, by promulgating and maintaining a rule prohibiting all forms of solicitation and distribution of literature on its premises, and by threatening a union member with arrest and physical violence because of his distribution of certain literature, has violated and is violating Section 8(b)(1)(A) of the Act.

B. *The Facts*

Douglas Murray has been a member of the Respondent for 10 years and has obtained work through Respondent's three hiring halls located in Pittsburgh, Martinez, and Richmond, California. During the last several years he has been an active union member. He has attended and actively participated in almost every monthly union meeting; he has continually criticized local union leadership and, in this regard, has attempted to secure the passage of various motions and resolutions which he initiated; he has filed several prior unfair labor practice charges against the Respondent and various employers; and he recently has been an unsuccessful candidate for union office.

In conjunction with the foregoing activities, Murray has edited and published a rank-and-file newsletter entitled the ''Pick & Shovel.'' Although it appears that several other members of Respondent, including Murray's wife, Melba Clark, have assisted Murray in this endeavor, Murray is clearly responsible for the contents of each edition of the newsletter that bears his photo on the front page above the heading, ''Douglas Murray, Editor.'' Insofar as the record shows, the newsletter is published on an irregular basis, perhaps every 2 to 6 months. It customarily consists of 8 to 10 pages, and is a compilation of articles written by Murray or other union members, cartoons, poems, solicitations for money and for free subscriptions, letters to the editor, and other articles copied from other sources.

The newsletters contain labor-related matters in general, but not solely, and includes considerable material dealing with issues other than those directly related to the Respondent. The contents of the newsletters include: a ''Literature List'' of some 13 publications pertaining generally to democracy within labor organizations, together with the purchase price and address of the organization offering such publications for sale; an article describing at length ''The Real Value of the Union Steward-and the Steward Systems''; a reproduction of a United Farm Workers of America handbill urging support of the United Farm Workers in their campaign to end the use of dangerous pesticides on table grapes; a copy of a bulletin advertising various ''labor studies'' classes at local community colleges; articles on racing, sexual harassment in the workplace, sexism, women's rights, poverty among women, slavery, and the homeless; and articles dealing with several infamous labor strikes during the 1880's and 1890's.

Each issue, however, also contains articles critical of the Respondent's elected and appointed officials and representatives, and urges members to attend union meetings in order to remedy the wrongs set forth in the newsletter. Such articles contain, for example, allegations that union officers and representatives receive salaries, allowances, and expenses (the amounts of which are specified) far in excess of their value to the Union; and allegations that Respondent's leaders waste members' money on expensive meals and trips, disregard parliamentary procedure when it suits their purposes, engage in the negotiation of sweetheart contracts, and permit employers to disregard their contractual commitments, and countenance dishonest hiring hall procedures.

Since about June 1988 Murray handed out copies of his newsletter at the three aforementioned union hiring halls as members were waiting for job referrals, at union meetings, and at various job sites. In addition to the newsletter, he also handed out other informational packets consisting of pamphlets published by the NLRB and the Department of Labor, a pamphlet discussing parliamentary procedure, and leaflets from the Association of Union Democracy. Further. Murray has compiled a mailing list of some 200 union members, and mails the newsletter to these individuals.

On ''quite a few occasions,'' according to Murray, he would set out the above described material on a table at the hiring hall, and would hand out copies of the material on request as members were congregated there while waiting for

[2] See, for example, *Carpenters Local 316 (Bay Counties Contractors)*, 291 NLRB 504 (1988).

job referrals. Apparently, there was no attempt to prevent him from engaging in this activity until June 23, 1989.

On June 23, 1989, Murray spread out such material on a table at the Martinez hiring hall. Murray was unable to specify the particular issue or issues of the newsletter he may have had with him at that time, and testified that it could have been any current or back issues which he happened to have in his possession.[3] While it appears that the most recent issue of the newsletter which Murray had published prior to that time was the January 1989 issue, Murray testified that he did not know whether that was one of the issues he was attempting to distribute on June 23, 1989.

Murray testified that as he was beginning to distribute his literature on that day, the Respondent's business manager and secretary-treasurer, Charles Evans, approached him and told him he would have to get the stuff off the table, and that he wanted Murray out of the hall. Murray objected, told Evans that if anyone wanted to play cards while waiting for a job referral, which the evidence shows was a customary occurrence during the operation of the hiring hall, they were certainly welcome to share the table he was using, and refused to leave. At this point Evans began to throw the material into Murray's briefcase without, according to Murray, reading or looking at any of it. Some yelling, profanity and pushing ensued. According to Murray, Evans said ''I'm not gonna fight you out here but if you come into the back room, I'll blow your head off.'' Murray said, ''Well, you're not the only one who can get a gun,'' and that he would not leave unless Evans called the police. Evans said that he had already called the police. When the police officer arrived, Evans said that he wanted Murray removed from the hall because he was passing out literature. Murray told the police officer that he felt he was within his constitutional rights. The police officer then asked Evans if there was any union rule prohibiting the passing out of literature, and Evans said no. That concluded the episode; the police officer left, Evans returned to his office, and Murray continued handing out literature. According to Murray, there were about 20 union members present at the time.

At the regular June 27, 1989 union meeting, 4 days later, the membership passed the following rule which, since that date, has been posted at each of the Union's hiring halls:

NOTICE

> During operating hours the offices & halls of Local 324 are to be used only for legitimate union business. No person is permitted to use these premises for solicitation for any cause nor for distribution of literature.

Murray was apparently ejected from the June 27 union meeting for reasons unrelated to his passing out of literature,[4] but retained outside the union hall talking to other members as he passed out his material, including back issues of the newsletter. When the meeting ended, business Agent Jesse Duran approached Murray and said, ''[W]ell, Dougie, the next time you hand out literature you're gonna be arrested.''

On August 2, 1989, Murray went to the Martinez hiring hall. After roll call had ended he stood in Respondent's parking lot distributing, according to Murray, probably the July/August issue of the newsletter together with a bumper sticker reading ''Put the 'You' in Union.'' He also solicited members for his newsletter mailing list. On this occasion Business Agent Duran approached Murray and several other members who were speaking with Murray, and said that he was going to call the police if Murray didn't leave. Murray told him to go right ahead. Duran went back into the union hall. Apparently the police were not called. Murray has continued to distribute his literature on the sidewalk and in the parking lot at the various union halls.

Murray testified that since June 27, 1989 he has not ''openly'' distributed any literature inside the union halls as a result of having been threatened with arrest and because of the possibility that he would be brought up on internal union charges for violating the posted notice. However, he discretely carries copies of the newsletter with him while he is inside the union halls, and provides them to members.

In addition to filing the charge, which is the subject matter of the instant complaint, Murray has filed an action under Title 1 of the Labor Management Reporting and Disclosure Act (LMRDA), which complaint is currently pending in the United States district court for the Northern District of California.[5] Insofar as the record shows, Murray, in the LMRDA suit, is contending that he ran for union election and was defeated as a result of his First Amendment rights having been violated by the Respondent's conduct in precluding him from disseminating his newsletter and other materials within the union halls. Thus, the district court proceeding, which is in the deposition stage, appears to deal with the identical issue presented herein, namely, whether the LMRDA prohibits the promulgation and enforcement of the no no-distribution and no-solicitation rule under foregoing circumstances and, apparently, the additional circumstances associated with Murray's unsuccessful bid for union office. The precise allegations involved in the district court proceeding however are not contained in the record herein.

There is no contention that the Respondent has interfered with Murray's right to obtain employment through the Union's hiring hall, or has otherwise attempted to interfere with his employment.

Business Manager Evans testified that several members complained to him that they objected to Murray passing out literature in the hall, that ''enough was enough,'' and that ''This guy is driving us crazy with it.'' According to Evans, the members just got tired of it, particularly as the union election was over, and they wanted to know ''Why all this stuff, all this critical stuff, why is he still passing it out now?'' Evans did not testify that he or anyone else objected to the specific contents of any of the newsletters. Thus, although to a very limited degree some of the newsletters contain profanity and verbal insults of a personal nature aimed

[3] As a result of this testimony by Murray, I initially rejected the issues of the newsletters, since the complaint alleges that the Respondent unlawfully precluded Murray from disseminating ''dissident'' material on June 23, 1989, and it appeared clear that Murray could not identify the specific material he distributed on that date. However, as noted above, I have since reconsidered my ruling and have received the exhibits into evidence.

[4] It appears, from reports contained in the various newsletters, that Murray's ejection from union meetings is not an uncommon occurrence.

[5] *Douglas Murray v. Laborers Union. Local 324*, Case No. C 89-4206 VWR.

at the Respondent's representatives, Evans did not single out such verbiage as providing the impetus for the adoption of the no-solicitation and no-distribution rule.

Murray testified that at a union meeting in July, when Murray, and apparently others, attempted to get the membership to rescind the rule, Evans said, in justification for the continued application of the rule, that such a rule was necessary in order to prohibit adherents of the Ku Klux Klan or the Black Panthers from distributing literature within the union halls.

Analysis and Conclusions

The complaint alleges that the Respondent's conduct, set forth above, is in retaliation for Murray's distribution of ''dissident union literature.'' and that Murray's activities in attempting to distribute such literature are protected by both the Act and the Labor-Management Reporting and Disclosure Act.[6]

In *Carpenters Local 22 (Graziano Construction)*, 195 NLRB 1, 2 (1972), the Board found that the respondent union violated Section 8(b)(1)(A) of the Act by citing and find a union member for securing signatures on a petition in protest of intra-union election irregularities. The Board set forth its rationale as follows:

> It is by now well settled that although Section 8(b)(1)(A) ''leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest'' and ''impairs no policy Congress has imbedded in the labor laws,''[1] it does not permit enforcement, by fine or expulsion, of a rule which ''invades or frustrates an overriding policy of the labor laws. . . .''[2] Cases decided to date, holding that union enforcement of a rule by fining a member violates Section 8(b)(1)(A) of the Act, have involved the protection of important policies embodied in the Act itself, such as the right of employees to gain access to the processes of the Board to seek to remedy union conduct violative of the Act, [*footnote omitted*] or the right of employees who sought to observe contractual responsibilities to protection against union efforts to punish them for refusing to breach such responsibilities. [*Footnote omitted.*] The policies which the Union's conduct here seeks to frustrate are embodied in the Labor Management Reporting and Disclosure Act of 1959, rather than specifically in the National Labor Relations Act. This difference does not, however, impel a different conclusion.
>
> As the above-quoted language from the Supreme Court's decision in *Scofield* implies, the Board is charged with considering the full panoply of congressional labor policies in determining the legality of a union fine.[5] Here the Union, in the guise of enforcing internal discipline, has sought to deprive its members of the right, as guaranteed by the Labor-Management Reporting and Disclosure Act, to participate fully and freely in the internal affairs of his own union. A fine for that purpose not only in our opinion fails to reflect a legitimate union interest but rather in fact impairs a policy that Congress has imbedded in the labor laws. For these reasons, we conclude that the Respondent Union's conduct in fining Shanley because of his intraunion activity violated Section 8(b)(1)(A) of the Act.

In *Operating Engineers Local 400 (Hilde Construction Co.)*, 225 NLRB 596 (1976), the Board adopted the decision of the administrative law judge who found that the respondent union violated the act by disciplining union members for conducting an ''open discussion'' meeting to question the procedures used by the union in taking a strike vote, and to voice their dissatisfaction with the outcome of the vote. The administrative law judge, in finding a violation, stated, at page 602:

> Therefore, not only did no rule exist prohibiting Respondent's members from convening unofficial meetings, but even had such a rule existed, Respondent's disciplinary action against the Charging Parties would violate Section 8(b)(1)(A) both because it restrained and coerced them in their Section 7 right to question the wisdom of their representative and to pursue a course designed to align their representative with their position and, also, because it restrained and coerced them in the exercise of rights guaranteed them by the LMRDA.

In *Machinists Local 707 (United Technologies)*, 276 NLRB 985 (1985), the Board adopted the decision of the administrative law judge who found that the respondent union violated Section 8(b)(1)(A) of the Act by processing internal union charges against members because they promulgated a leaflet criticizing certain local union incumbent officials prior to an internal union election. The leaflet made references to forgery, theft, and the use of narcotics by union officials, and was distributed to members and nonmembers at plant gates.

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[1] *Scofield v. NLRB*, 394 U.S. 423, 430.

[2] Id. at 429.

. . . .

[5] *Teamsters Local 663, a/w International Brotherhood of Teamsters, etc. (Continental Oil Company)*, 193 NLRB [581 (1971)]. Cf. *Southern Steamship Company v. NLRB*, 316 U.S. 31 [(1942)]; compare *Local 1976, United Brotherhood of Carpenters etc. (Sand Door & Plywood Co.) v. NLRB*, 357 U.S. 93 [(1958)]. We are not unmindful of the fact that the Department of Labor, and not this Agency, is directly charged with the administration of the requirements of the Landrum-Griffin Act. We traditionally respect this differentiation. See, e.g., *Desert Palace. Inc. d/b/a Caesar's Palace*, 194 NLRB [818], fn. 5 [(1972)]. In this area, however, as we understand it, we have been specifically charged by the Supreme Court with the duty of determining the overall legitimacy of union interests, and must therefore take into account *all* Federal policies and not limit ourselves to those embodied in our own Act.

[6] Sec. 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 U.S.C. Sec. 411(a)(2) provides:

> Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in a election of the labor organization or upon any business properly before tbe meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to bis refraining from conduct that would interfere with its performance of its legal or contractual obligations.

In *Operating Engineers Local 139 (AGC of Wisconsin)*, 273 NLRB 992 (1984), the Board found that the respondent union violated Section 8(b)(1)(A) of the Act by, in addition to other conduct, the bringing of internal union charges and the imposition of a fine against a union member, because such acts were committed in retaliation for the member's publishing of a dissident newspaper, ''The Ethical Engineer,'' which contained articles critical of union officials. The newspaper had apparently been published on an irregular basis over a period of about 5 years and was distributed by mail to union members.

In *Morrissey v. Wall*, 96 LRRM 2809 (S.D.N.Y. 1977), the district court determined that the union violated the LMRDA by adopting a rule similar to the rule adopted by the Respondent herein, which prohibited ''the distribution of written material, other than official NMU publications or written materials . . . inside the Union hiring hall or other areas inside these premises where other Union business is conducted.''

In *Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981), the Court reversed the Board[7] and found that the respondent union violated Section 8(b)(1)(A) of tbe Act by removing certain dissident union literature from the union's in-plant bulletin board, and by thereafter precluding the union member from posting such literature, while at the same time permitting employees to use the bulletin board for nonunion business and for personal notices. The Court noted that even if the union's action was pursuant to a valid rule, the union nevertheless violated the Act because its conduct failed to satisfy the criteria set forth by the Supreme Court in *Scofield*, supra. Thus, to summarize in part the findings of the Court of Appeals, the removal of the material from the bulletin board did not reflect a legitimate union interest as the ''desire to prevent controversy or to suppress criticism of union leadership does not constitute a legitimate union interest''; and the union's conduct impairs policies embedded in the labor laws, including both Section 7 of the Act and also Section 101(a)(2) of the LMRDA, which has been been interpreted to confer an ''almost absolute'' right of free speech upon union members. Further, the Court noted that the existence of alternative means of communication with the membership was irrelevant, and ''the simple fact that the union has attempted to restrain an employee in the exercise of his Section 7 rights is enough to justify a finding of a Section 8(b)(1)(A) violation.''

The Respondent argues that under the provisions of the LMRDA members are required to exhaust all internal union remedies available to them under the union's constitution prior to bringing an action for a violation of the LMRDA. In *Operating Engineers Local 400*, supra, the Board affirmed the administrative law judge's finding (at 605–606), that ''the first proviso in LMRDA, Section 101(a)(4)[8] cannot be invoked to preclude the Board from considering a violation predicated on LMRDA, Section 101(a)(2). Such a result has been foreclosed in *NLRB v. Industrial Union of Marine and Ship Workers*, 391 U.S. 418, 426 (1968). . . .''

The Respondent also argues that the complaint should be dismissed because Murray has elected to file a lawsuit in the United States district court, which suit is now pending, containing allegations that the Respondent has violated the LMRDA by the identical conduct involved herein, and that, under the circumstances, it is more appropriate for the Court rather than the Board to determine whether the Respondent's conduct is violative of the LMRDA. The Respondent has not cited any Board or court authority in support of its argument, and even though the issues presented here may be resolved in either forum,[9] there appears to be no compelling reason to require the Board to defer to the Court, as the Supreme Court, in *Scofield*, supra, has conferred upon the Board, in conjunction with its enforcement of the Act, the responsibility of determining whether union conduct impairs policies Congress has imbedded in the labor laws.

The Respondent also argues that to invalidate the no-solicitation and no-distribution rule in this instance is tantamount to requiring the Respondent to permit a member to distribute any type of literature he or she desires to distribute, including, for example, racist or religious material. In the instant case, the evidence is clear that the rule was instituted in order to preclude Murray from distributing dissident Material critical of the Respondent's leadership. That is the gravemen of the complaint herein. Should, in the future, the Respondent institute a rule which does not so restrict a member's rights under Section 7 of the Act and Section 101(a)(2) of the LMRDA, such a rule would clearly constitute a valid exercise of the Respondent's right to adopt reasonable rules governing the conduct of its members.

The Respondent also maintains that the newsletters distributed by Murray contain an abundance of articles which are clearly beyond the scope of the sanctions of the Act or the LMRDA. Assuming arguendo that this is the case, and that the Respondent would not run afoul of either statute if it elected to prohibit the distribution of such material in its halls, the evidence presented by the Respondent does not show that the rule in question here was adopted for the purpose of precluding the distribution of such material. Rather, as Evans testified, the rule was adopted because certain members became annoyed with Murray's continuing dissemination of *any* literature subsequent to the election, regardless of its content. Indeed, Evans' testimony to the effect that the rule only applied to the hiring hall operations of Respondent and not to union meetings, at which time, according to Evans, Murray and other union members were free to distribute whatever they wanted to, including the ''Pick and Shovel'' newsletter, demonstrates that the rule was not designed to prohibit the dissemination of material which the Respondent may be privileged to prohibit.

It is clear that the Respondent's adoption of the rule did inhibit Murray from exercising rights guaranteed by Section 7 of the Act and by the LMRDA. Further, there appears to be no compelling reason to insulate Respondent's hiring halls from the exercise of such rights. Indeed, Respondent's hiring

[7] 248 NLRB 83 (1980).

[8] The first proviso is as follows: ''Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof. . . .''

[9] It should be noted that the finding of a violation herein would not resolve a most significant issue in the district court proceeding, namely whether the union election was tainted as a result of the application of the no-solicitation and no-distribution rule.

halls are a most effective location for members to present dissident points of view. Based on the foregoing, I conclude that the Respondent has violated Section 8(b)(1)(A) of the Act as alleged by adopting the no-solicitation and no-distribution rule designed to preclude the distribution of dissident union material; by threatening to have Murray arrested and removed from the hiring hall in order to preclude him from distributing dissident union material; and by threatening to have him arrested if he continued to disseminate such material outside the hiring hall.

CONCLUSIONS OF LAW

Associated General Contractors of California, Inc., and its constituent members, including Lawson Mechanical Contractors, are now, and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

The Respondent has violated Section 8(b)(1)(A) of the act by adopting a no-solicitation and no-distribution rule designed to prohibit the dissemination of dissident union material; by threatening a member with arrest and removal from its hiring hall in order to preclude him from distributing such dissident material; and by threatening him with arrest if he continued to disseminate such material outside the hiring hall.

THE REMEDY

Having found that the Respondent has violated the Act by the adoption of its no-solicitation and no-distribution rule, and by other conduct, the Respondent shall be required to rescind the rule, and to cease threatening members with arrest for distributing dissident union material either inside or outside of its union hiring halls.

The Respondent shall also be required to post an appropriate notice attached hereto as ''Appendix.''

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Laborers' Union Local No. 324, Laborers' Union of North America, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Adopting and enforcing a no-solicitation and no-distribution rule which prohibits the dissemination of dissident union material.

(b) Threatening the arrest of any union member for disseminating dissident union material inside or outside of its hiring halls or meeting places.

(c) In any like or related manner restraining and coercing members in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the no-solicitation and no-distribution rule which has been in effect since June 27, 1989.

(b) Post at each of its facilities copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of The United States Government

WE WILL NOT enforce the no-solicitation and no-distribution rule which we adopted on June 27, 1989, and which prohibits union members from distributing within our union halls literature which criticizes the officers or representatives of the union or which solicits support for opposing points of view.

WE WILL NOT threaten to have union members arrested for distributing such literature in or around our union halls.

WE WILL NOT in any like or related manner, restrain and coerce our members in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL rescind the no-solicitation and no-distribution rule which we adopted on June 27, 1989, and remove the posted rule from our union hiring halls.

LABORERS' UNION LOCAL NO. 324, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO